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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-974

COUNTY OF MILWAUKEE,
Applicant for Limited Intervention,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS, PEOPLE OF THE STATE OF MICHIGAN, CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, and THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER MILWAUKEE COUNTY

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CORRECTIONS OF PETITION

As a prefatory statement, petitioner wishes to correct two inconsequential errors in the petition. First, the caption of the petition on the cover and first page of that document (which is identical to the title of petitioner's prior motion for limited intervention in the pending action before the United States Court of Appeals for the

Seventh Circuit) has been revised in this reply brief to conform with the status of the case in the Supreme Court of the United States. Second, through a printer's mistake on page 2 of the petition, the paragraph under the heading "JURISDICTION" contains an erroneous citation of a section of Title 28 of the U.S. Code. The correct citation is 28 U.S.C. § 1254(1) instead of § 1251(1). Respondents have not been prejudiced by these minor errors; the title of the petition is correctly set forth in the separate briefs in opposition filed by the States of Illinois and Michigan, and both briefs make reference to 28 U.S.C. § 1254(1) as the correct jurisdictional statute.

ARGUMENT

The substantive content of the briefs in opposition, stripped of all rhetoric, can be summarized as relying on the following 5 points:

1. The petition was filed more than 90 days after the Court of Appeals issued its order denying intervention.
2. Petitioner is not an indispensable party entitled to intervene.
3. The interests of petitioner were adequately represented by other defendants in the proceedings before the District Court and Court of Appeals.
4. Petitioner did not seek timely intervention in the prior court proceedings.
5. The District Court's Judgment Order does not impose prohibitive costs on petitioner, and the petition lacks broad precedential importance.

To the extent that these 5 points have been adequately addressed in the Petition for Certiorari, they need not

be specifically or separately answered in this reply brief, which must necessarily be limited to new matters raised by the briefs in opposition.

On the first point, however, because of contentions respectively made in the "Jurisdiction" paragraph of the Illinois brief (pp. 2, 3) and in the "Questions Presented" paragraph of the Michigan brief (p. 2) that this petition is governed by the 90 day time limit of paragraph (c) of 28 U.S.C. § 2101, rather than by paragraph (e) of the same section, we must refute that inaccuracy. Paragraph (c) specifically applies to the review by this Court of "any *judgment or decree* in a civil action," whereas petitioner herein seeks review of an *order* of the Court of Appeals denying petitioner's application for limited intervention. (Emphasis supplied). Therefore, inasmuch as no judgment or decree has yet been entered by the Court of Appeals, petitioner has invoked the jurisdiction of this Court under paragraph (e) of the above section to review such order of the appellate court. The time criteria specified in the latter paragraph is that "review [of] a cause before judgment has been rendered in the Court of Appeals may be made at any time before judgment." The resolution adopted by the Milwaukee County Board of Supervisors authorizing the instant petition appears on p. 79 of petitioner's appendix to the petition and states in part:

> ". . . under U.S. Statutes (28 U.S. Code, Section 2101e) such an application — or appeal — must be taken before the Appeals Court rules on the appeal of the case itself, . . ."

It has never been the intent of petitioner to seek any review by this Court under § 2101(c) of Title 28 U.S.C. Possibly respondents Illinois and Michigan may have

misread or misconstrued the instant petition in that respect.

In this connection, the petitioner and both opposing respondents have relied on the decision in *International Union (Auto Workers), Local 283 v. Scofield,* 382 U.S. 205 (1965), as authority for the proposition that a party denied permission to intervene in the Court of Appeals may petition this Court for review of such an order. See petition, p. 2 (footnote [1]), Illinois brief in opposition, p. 7, and Michigan brief in opposition, p. 5. A careful reading of such decision discloses that no mention is made therein of any requirement that a petition for certiorari to review denial of intervention must be "filed within the ninety (90) day time limit specified in 28 U.S.C. § 2101(c)," as contended by the Michigan brief in opposition, p. 5.

With regard to foregoing points 2, 3, 4 and 5, the following references to the petition are made:

2. Indispensable party issue. See pp. 10, 11, 12 and 13.
3. Adequacy of representation issue. See pp. 6 and 8.
4. Timely intervention issue. See p. 8.
5. Costs and broad importance issues. See pp. 7, 8 and 9.

By way of further assertion that petitioner's application for intervention made to the Circuit Court of Appeals was not untimely, we point to the first resolution adopted by the County Board of Supervisors regarding this matter, which appears on pp. 59 and 60 of the appendix to the petition. The identifying data at the top of this resolution notes that it was introduced on January 17, 1978, and the certificate following the resolution states

that it was adopted on May 23, 1978 and became effective June 20, 1978. Thus there was a short period of approximately 2 months following the District Court judgment order of November 15, 1977 for the impact of that ruling to be adequately studied and absorbed by county officials. Four months were consumed in the resolution's making its way through the legislative process, and almost another month until executive action on the resolution was completed on June 20, 1978. The motion for limited intervention was filed in the office of the Court of Appeals for the Seventh Circuit on July 21, 1978 — just 31 days after county board authorization therefor took effect. While the total time elapsed was 8 months and 1 week, yet in the light of the facts above recited, the accusation of the briefs in opposition that the intervention application was not timely made is, to say the least, unrealistic.

Three other statements in the respective briefs require some refutation. A statement is made on p. 5 of the Illinois brief that "the proof at trial was that the cost of the sewage treatment plant improvements and standards is about 60 million dollars, or less than two dollars per household per month." Actually this was the testimony given by one witness for the plaintiff. Hence this 60 million dollar figure is at best a mere estimate which almost borders on the ludicrous in the light of more recent objective studies.[1] The ultimate projected local costs in complying with the District Court order would thus seem to be closer to 600 million dollars than to 60 million dollars.

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[1] Milwaukee Sentinel news article, February 18, 1979, titled "Bonds Given Top Rating" and Milwaukee Journal news article, February 11, 1979, titled "Planners Navigate Sewer Cost Maze." (Both reprinted with permission at end of reply brief)

The last two statements in the briefs in opposition, which we believe should be contradicted, are (1) the reference on p. 5 of the Illinois brief to lethargy on the part of petitioner before intervening in the controversy, and (2) the statement on p. 4 of the Michigan brief that petitioner does not seek review of the trial court's findings and/or remedy. By attributing lethargy to petitioner, Illinois conveniently distracts attention from the basic fact that, as plaintiff in the action, it had the obligation, under Rule 19, Fed. Rules Civ. Proc., 28 U.S.C., to bring before the court all parties necessary for disposal of the issues in the lawsuit, including the issue of liability to pay for the remedy. At any stage of the proceeding Illinois could have moved to join Milwaukee County as a necessary defendant, but never did so. Further, Illinois could and should have instituted this suit in the defendants' jurisdiction rather than within its own state boundaries so as to have provided a better awareness of this complicated controversy to those on whom it has had an adverse financial impact. And our response to the Michigan statement is that while petitioner does not seek to review the finding of liability by the District Court, its position both before the Court of Appeals and in this Court has consistently been that, once liability was determined, Milwaukee County then became a necessary and indispensable party to the fashioning of a just and fair remedy. It is in this latter regard that Milwaukee County, as a separate legal entity and tax levying governmental body, cannot be said to have been adequately represented by the defendants present at the trial and post-trial proceedings related to remedy.

CONCLUSION

For these further reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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February 20, 1979

(Extension of Footnote 1)

MILWAUKEE SENTINEL

Local News

Saturday February 17, 1979

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Bonds given top rating

Moody's Investors Service, Inc., Friday gave Milwaukee County's upcoming $47.7 million bond issue its highest credit rating — triple A.

At the same time, the New York City bond rating agency issued a statement indicating the rating could be lowered if the court ordered $1.7 billion sewer cleanup here is not overturned.

The county must finance the cleanup for the Metropolitan Milwaukee Sewerage District and will issue bonds to cover most of the cost. Of the $47.7 million worth of bonds to be sold by the county Feb. 27, $38 million are for sewer purposes.

"We cannot guess what will happen, but if it (the court order) is not reversed, we would certainly have to take a very hard look at the credit rating," said Freda Ackerman, vice president and assistant director of municipal bond research for the firm.

The credit rating is used by investors to assess the quality of a bond offered for sale. Were the county's rating to fall, investors would demand a higher interest rate, resulting in higher costs to property taxpayers.

Milwaukee County has been rated triple A by Moody's since 1953, Ms. Ackerman said.

Another bond rating agency, Standard and Poors, is expected to issue its rating next week. That agency now also rates the county triple A.

Ms. Ackerman said Moody's rating committee was impressed with the county's high income levels, diversified tax base and relatively small amount of debt.

She said the rating committee "very thoroughly discussed the current litigation . . . and that did cause us a little bit of concern. We will mention it in the report we give to investors."

Ms. Ackerman said, however, that because the case is under appeal, "it would be premature for us to take any action on the bond rating."

(Extension of Footnote 1)

Planners Navigate Sewer Cost Maze

By Thomas J. Hagerty
Journal Environmental Reporter

The water and waste wizards at the Milwaukee Metropolitan Sewerage District have thrown lots of able accountants and new computers into the scramble to get the public its money's worth and to compete for aid from the state and the US Environmental Protection Agency.

Avoiding sleight of statistics temptations, the accountants are trying for the most honest possible analysis of future expenses. Costs are probably the most difficult item to explain in the district's gigantic water pollution abatement project. Yet costs and how to spread them among the district's 23 municipalities seem to loom large in the public's eye.

Did you know, for example, that:

Cleaning up sewage treatment plant discharges to the extent required by the standard set by Federal Judge John F. Grady in Chicago would mean capital costs in each of eight years, possibly starting in 1986, that would be more than this year's entire Milwaukee County tax levy for *all* purposes?

Grady set the stringent standard in the case brought against the district by the State of Illinois, after finding that discharges into Lake Michigan from the Milwaukee treatment plant posed a hazard to the health of Illinois residents.

Meanwhile, the district already had been planning to solve the admitted pollution problem by bringing its discharges up to the standards of the State Department of Natural Resources and the EPA, and it already has virtually done this. The Grady standard, which the district is appealing, would cost about $300 million more to implement than merely meeting state and federal standards, the district estimates.

There are no federal funds available for many of the improvements that Grady mandated? That the county is limited to raising capital funds for the district through the property tax with its reliance on 20 year bonds that yield a relatively low 5.5% rate of interest? Indeed, that the county cannot issue revenue bonds with their relative-

Turn to Cleanup, page 2, col. 1

THE MILWAUKEE JOURNAL

Sunday, February 11, 1979

Cleanup

District Speeds Cleanup Plans

From Page 1

ly slight impact on the tax burden of county taxpayers?

It will be 1980 before construction costs will exceed engineering expenses, which are expected to drop sharply after 1983? The principle involved here is the same as that for other large scale projects, including nuclear power plants, subways and expressways. Sound planning is supposed to keep as low as possible the inevitably large and continuing local burden of operating and maintaining what is built.

There are other vexing prospects, based on the district's best guesses, about possible painful increases in taxpayer burdens because of growing demands for the limited supply of state and federal sewer aid.

The treatment costs to meet Grady's standard, for example, will cost at least as much again as what it will take to finish off the treatment improvements necessary to meet the federal and state standards and to eliminate sewer overflows, according to William Katz, technical services director.

Toward this possible $300 million additional investment, the district is planning on receiving from $60 million to $80 million a year in federal sewer aid. At the same time, however, the entire state of Wisconsin's annual share of the EPA's $4.2 billion a year for sewer construction funds is expected to hold at about $80 million annually.

Other Cities Restive

Thus, other Wisconsin cities that are under State Department of Natural Resources orders to upgrade their sewers may not be willing to settle for aid only from the newly created Wisconsin Fund — which Milwaukee also plans to draw upon.

The sewerage district has asked the DNR for $19 million from the Wisconsin Fund for projects this year, including important interceptor and relief sewer projects in areas expected to be plagued by sewage backups in basements during spring floods.

Eight of the projects have been ranked in the DNR's top 50 list, pending receipt of the district's specifications by June 30. The district is limited by law to one-third of the fund, because it is expected to be given most, and maybe all, of the EPA grants allotted to Wisconsin.

Under the optimistic $80 million forecast for federal aid to the district, the annual local share of costs would peak at $138 million to meet the Grady standard. It would reach $67 million and taper off more quickly for the federal-state ordered improvements.

$1.7 Billion in Budget

Keeping in harness this overall $1.7 billion pollution abatement budget will challenge district budget analysts to hit on the best sewage treatment system residents can afford and will accept.

This is a financially conservative community, a characterization accepted by the district's executive director, Joel Wesselman.

"It's a subjective statement, but it has wide acceptance here," he said. Does Wesselman suspect that frugal thinking may shackle the district?

"Milwaukee's frugal thinking, accompanied by a strong sense of individual and community responsibility, means public officials (sewerage commissioners) will have to justify expenditures," said Wesselman.

Demanding Timetable

Wesselman's six key division heads must show results under pressure from the tight pollution abatement timetable that Grady laid down and that calls for meeting the standard no later than 1989. The job of putting district dollars to work mainly falls to Robert Ehlert, director of finance and administration. Ehlert formerly was Milwaukee County's chief fiscal officer.

He and other district officials recently returned from meetings in New York City to shore up Milwaukee County's reputation and Triple A listing with the country's leading bond rating firms. Ehlert described the trip as encouraging.

The district will be the key to the county's future financial stability. Ehlert must keep principal budget items under control, invest district funds at a good rate of return, prune costs and justify expenditures.

Computers help Ehlert keep close tabs on 350 research and engineering segments — "a God awful lot of activities," said Wesselman.

A Flood of Data

The machines meter a flood of financial facts. Monthly, they update progress so Ehlert and his staff can document and justify expensive facility designs, identify bottlenecks and correct imbalances as planning rushes along.

His staff numbers 36, twice its size last year, and will be 42 by year's end. The Finance Division costs represented a big hunk of the budget increase from 1978 to 1979.

Wesselman said the old accounting unit was so small that it had strained even to stay abreast of routine operations.

"Decisions must be made at a rate that is very uncommon," he said. The district does not have the luxury of stopping and waiting for a clearer picture of possible pitfalls down the road, he said. "The financial review process is often strained because we must make decisions so quickly."

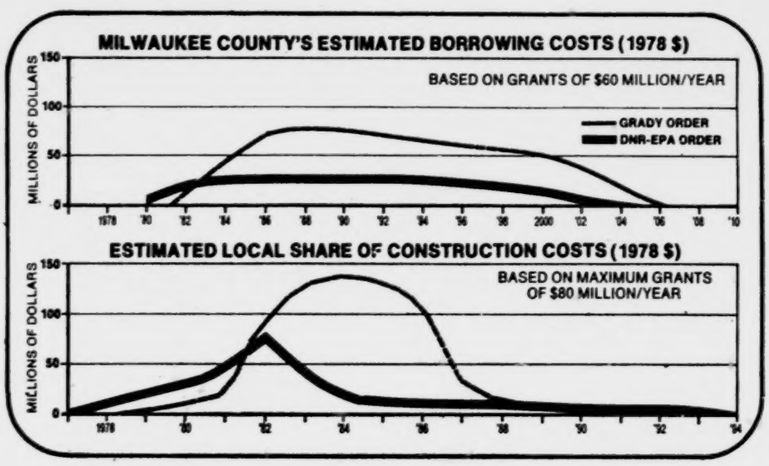
200 Consultants

The elaborateness of it all — there are now 200 consultants and about 50 district engineers on board — contrasts with old district images.

Everyone is making predictions: about who will pay for what and how much; how many interceptor sewers will be allowed and where; how and when the US 7th Circuit Court of Appeals in Chicago will rule on Grady's decision.

The sewerage commissioners, the bottom line, control policy, hold the purse strings and sometimes exhibit a tenacious but nervous concern over money.

Commissioner Harry Williams carries a pocket calculator that he sometimes consults at commission meetings. He does this to check district staff computations of millions of dollars in construction costs and to calculate, and speculate, about net return on investment.



By a Journal Artist

The costs of improving Milwaukee's sewage treatment will be much higher to meet the standards set by Federal Judge John F. Grady in Chicago than to meet the standards of federal and state environmental agencies. These charts show the projected costs of borrowing to pay for the improvements required under each plan and the projected total amount that would be paid annually by local government for construction of new facilities. The $80 million in yearly federal aid projected in the lower chart would be in addition to the local costs.